Eight Mile Style, LLC et al v. Apple Computer, Incorporated
Doc. 111

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

______________________________________/

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

DEFENDANT AFTERMATH RECORDS AND APPLE INC.'S REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE DECLARATION OF PATRICK SULLIVAN AND PLAINTIFFS' "STATEMENT OF MATERIAL FACTS" AND CONDITIONAL MOTION TO STRIKE PLAINTIFFS' LATE-PRODUCED DOCUMENTS

Daniel D. Quick (P48109)
Dickinson Wright PLLC
38525 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 433-7200
dquick@dickinsonwright.com

Melinda E. LeMoine
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9238
melinda.lemoine@mto.com

Attorneys for Defendant

Dockets.Justia.com

I. INTRODUCTION

This Court expressly limited each side to 28 pages in the opening and opposition summary judgment briefs. (C.R. 65). Defendants complied, combining two longer motions into a single 28-page motion and lodging evidence (not attorney argument) in their supporting declarations. (C.R. 66). Plaintiffs, in contrast, submitted supplemental briefs disguised as an "expert declaration" that purported to opine on numerous matters discussed nowhere in Patrick Sullivan's report and a "Statement of Material Facts" that Plaintiffs concede this Court's Rules did not authorize. The 28-page limit that applies to Defendants must apply to Plaintiffs. Plaintiffs' disguised supplemental briefs should be stricken from the record.

II. ARGUMENT

A. The Sullivan "Declaration" Is Just An Extended Attorney Brief

Plaintiffs' argument "that attorneys may assist in the drafting of expert reports [and] declarations," Opp. at 1, is a red herring. In the first place, Plaintiff's counsel did not just "assist" Mr. Sullivan in writing his declaration. Sullivan admitted – as he had to, because the email correspondence establishes it – that Plaintiff's counsel wrote the entire declaration for him. *See* Ex. 1-A[1] at 248 (Sullivan Dep. Tr.) ("Q: Did you draft this Declaration? A: This was done by Ramona DeSalvo."); Ex. 1-C (DeSalvo to Sullivan: "as part of your declaration we will need you to address the various 'licenses' that Aftermath attaches .... the analysis will be in a chart form .... It's drafted but needs some work.").

The more fundamental problem with Sullivan's declaration is that counsel wrote it for the

[1] Exhibits designated 1-A, 1-B, etc. are attached to the Declaration of Melinda LeMoine attached as Exhibit 1 to Defendants' Motion to Strike. Exhibits designated 3-A, 3-B, etc. are attached to the Declaration of Melinda LeMoine provided as Exhibit 3 to this Reply.

obvious purpose of trying to end-run the Court's 28-page limitation on the opposition brief.[2] It is undisputed that counsel referenced Sullivan's declaration for the shorthand arguments regarding the other licenses that Plaintiffs limited to two-and-a-half pages. *See* Mot. at 3. By incorporating by reference the arguments they wrote for Sullivan's signature in his declaration, Plaintiffs expanded the available briefing they had to set forth arguments on other issues. This motion has nothing to do with the weight to be given to an expert's opinion (even if the attorney arguments in Sullivan's declaration were his opinions, which they are not). *See* Opp. at 2. The issue instead is compliance with the Court's 28-page briefing limit. Defendants complied with the Court's imposed limitations; Plaintiffs did not.

Plaintiffs try to obscure the record by making boilerplate assertions that Mr. Sullivan's declaration contains "the same" opinions set forth in Sullivan's expert report. Opp. at 1-2 (emphasis added); s*ee also id*. at 2 (claiming declaration "contained all of his already-held opinions"). In fact, the record evidence (not attorney argument) shows that Sullivan's declaration contains *numerous* opinions found *nowhere* in his report. Sullivan's declaration is directed to responding to the licenses other than those in the 1998 and 2003 Controlled Composition Clauses that were the basis for Defendants' summary judgment motion. *See* Ex. 3-A, ¶ 2 (Sullivan Decl.). Sullivan's report does not even mention these other licenses, much less present any of the opinions about them that Plaintiffs' counsel wrote into Sullivan's declaration. Indeed, Sullivan's disclosure of the "Case Documents" he claims he "reviewed" in forming his opinions related to the case does not list any of the other licenses. *See*. Ex. 3-B at 17 (Sullivan

[2] Plaintiffs made efforts to obtain additional pages for their Opposition from the Court, but that request was denied. Ex. 3-C.

Expert Report).[3]

Given that Sullivan's expert report does not say one word about the other license agreements, it is unsurprising that Sullivan's declaration contains numerous attorney arguments (labeled as his opinion) that are not in the expert report, including:

- "Mechanical licenses and DPD licenses are non-exclusive licenses and, without the consent of the copyright owners, are not transferable or assignable inasmuch as such licenses convey only a grant of rights (a personal right) and not any ownership (property) rights in the copyright." Ex. 3-A, ¶ 2.

- "[I]n virtually all instances," the third party licenses purportedly involve a co-author licensing a composition where it had "transferred his copyright interest to a music publisher." *Id.* ¶ 4.

- "When a license is issued for a musical composition, publishers require the license to be specific as to which recorded products their compositions will appear, and issue a separate license for each product, even if the recording is the same." *Id.* ¶ 5.

- "[E]ach such document, even if effective as a license ... are [sic] specifically limited to the territory of the United States .... I found that the Eminem Compositions have been reproduced and distributed worldwide by Apple through its iTunes Store." *Id.* ¶ 7.

In sum, Sullivan's declaration does not repeat assertions set forth in his expert report. The declaration makes attorney-drafted legal arguments about licenses that Sullivan did not even claim he reviewed in forming any disclosed opinion.[4] The declaration should be stricken.

---

[3] The email trail between Sullivan and Plaintiffs' counsel shows that Sullivan only started to receive "some" of those agreements by email just over an hour before Sullivan emailed his signed report to Plaintiffs' counsel. *Compare* Ex. 3-D & Ex. 3-E. Plaintiffs have no claim that they could not have provided the other license agreements to Sullivan earlier than August 12, 2008. Plaintiffs have admitted that they had all such licenses by no later than July 28, 2008. *See* Plaintiffs' Mot. to Exclude (C.R. 80 at 2).

[4] To the extent the items in Sullivan's declaration are "opinions," rather than attorney argument, they should be stricken for Plaintiffs' failure to disclose them in the expert report as required by Fed. R. Civ. P. 26(a)(2).

B. The "Statement of Material Facts" Is An Extended Attorney Brief

Plaintiffs concede that nothing in the Rules (Federal or Local) authorizes their "Statement of Material Facts." Their argument instead is that because some other courts require such a statement, Plaintiffs were permitted to circumvent the 28-page briefing limit with a supplemental brief that this Court has not authorized. *See* Opp. at 4-5. That obviously is no excuse for Plaintiffs' unauthorized filing, which should be stricken.

C. Plaintiffs Rely on Late-Produced Documents That Must Be Stricken If Their Motion To Exclude Defendants' "Late-Produced" Documents Is Granted.

Plaintiffs' response to the conditional motion to exclude Plaintiffs' own "late-produced" documents offers two reasons why the rules they want to apply to Defendants should not apply to them. Neither has merit.

First, Plaintiffs assert they are not relying on documents they produced after the discovery cut-off. Opp. at 8. That is wrong. Plaintiffs' opposition references and relies upon 10 exhibits to Joel Martin's declaration, none of which Plaintiffs produced until they filed their opposition. Ex. 1, ¶ 7(b). Plaintiffs rely on these documents to support Martin's claim of exclusive ownership of the compositions at issue. *See* C.R. 74-32, Ex. B to Pl's Opp. to Revised Mot., Declaration of Joel Martin and attachments Ex. B-6 (C.R. 74-38) through and including B-15 (C.R. 74-47). Plaintiffs obviously are relying on late-produced documents.[5]

[5] Plaintiffs are right that they produced a number of documents after the discovery cut-off that they do not rely on in their Opposition. The majority of those late-produced documents undermine Plaintiffs' claims (and would have been relied upon by Defendants in their summary judgment motion had Plaintiffs produced them in a timely manner). Most reveal undisclosed interests in the compositions that Plaintiffs themselves granted to Ensign Publishing Corp. ("Ensign") and to another publishing company. Plaintiffs' failure to disclose this information until well past the motion cut-off has significantly prejudiced Defendants. As but one example, Ensign issued numerous licenses authorizing the use the compositions in the precise manner Plaintiffs here challenge. *See* Def's Reply to Revised Motion (C.R. 94) at p. 6, and its Ex's G &

Second, Plaintiffs claim that Defendants never requested these documents. Opp. at 8. This argument, too, is wrong. Plaintiffs say that documents relating to their claim to own the compositions – an element of Plaintiffs' claim – were not requested until an August 19 letter. *Id.* at 6. In fact, Defendants requested such documents as early as February and May. See Ex. 3, ¶ 7; *see also* Def's Opp. to Mot. to Exclude (C.R. 86) at pp. 5-6, and 12-14; Ex. 1-D-1-G (Interrogatories No. 1, 2 and 5 and RFPs No. 1, 6, 8, 13, 14, 18 & 19) and 1-H-1-K (Interrogatories Nos. 23, 24 & RFP No. 22). Plaintiffs agreed to provide such ownership information both in their responses to Defendants' requests and in the meet and confer process. *Id.*; *see also* Exs. 3-F-3-H. Plaintiffs' claim of ownership and exclusive control is basic and critical to a claim of copyright infringement. They have provided no valid excuse for their failure to produce these documents until well after the discovery cut-off date, when the documents arrived attached to their Opposition to the Revised Motion.

III. CONCLUSION

The Sullivan Declaration, its Exhibits 2 and 3, and Plaintiffs' "Statement of Material Facts" should be stricken. If this Court grants Plaintiffs' Motion to Exclude (C.R. 80), then Exhibits B-6 through B-15 to the Declaration of Joel Martin must be excluded as well.

Daniel D. Quick
Dickinson Wright PLLC
38525 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
(248) 433-7200
dquick@dickinsonwright.com
(P48109)

s/Melinda E. LeMoine
Munger, Tolles & Olson LLP
355 South Grand Avenue Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9238
melinda.lemoine@mto.com

H. Defendants intend to seek complete relief for Plaintiffs' numerous discovery failures, including any necessary additional discovery as to these undisclosed relationships. *See* Ex. 3-I & 3-J. Whether or not Plaintiffs rely on these late-produced documents here, if this Court adopts the rule Plaintiffs urge, then Plaintiffs should not be permitted to rely on them in any pleading.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

s/Melinda E. LeMoine
Munger, Tolles & Olson LLP
355 South Grand Avenue Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9238
melinda.lemoine@mto.com